

Decision mailed: 3/25/11  
Civil Service Commission *OR*

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

**SUFFOLK, ss.**

**One Ashburton Place - Room 503  
Boston, MA 02108  
(617) 727-2293**

**KRIS PHILLIPS,**  
Appellant

v.

**CASE NO: D1-09-21**

**TOWN OF HINGHAM,**  
Respondent

Appellant's Attorney:

Alan J. McDonald, Esq.  
Jason R. Powalisz, Esq.  
McDonald Lamond & Canzoneri  
Cordaville Office Center  
153 Cordaville Road, Suite 320  
Southborough, MA 01772

Appointing Authority Attorney:

James A. Toomey, Esq.  
Robyn Hegerich, Law Clerk  
Murphy, Hesse, Toomey & Lehane, LLP  
300 Crown Colony Drive, Suite 410  
Quincy, MA 02169

Commissioner:

Paul M. Stein

**DECISION**

The Appellant, Kris Phillips, acting pursuant to G.L.c.31, § 43, duly appealed to the Civil Service Commission (Commission) from a decision of the Board of Selectmen in the Town of Hingham (Hingham), the Appointing Authority, to discharge him as Lieutenant in the Hingham Police Department (HPD) for alleged assault and battery upon another Hingham municipal employee. A full hearing was held by the Commission on May 20, 2009 and June 2, 2009 at the offices of the Commission. The hearing was declared private as no party requested a public hearing. Witnesses were sequestered save for the Appellant and HPD Chief Taylor A.B. Mills. Hingham called five witnesses and the Appellant testified on his own behalf. Eighteen (18) exhibits were marked. The hearing was digitally recorded. Post hearing submissions were received by the Commission from each of the parties on July 14, 2009.

## FINDINGS OF FACT

Giving appropriate weight to the exhibits and testimony from the Appellant; HPD Chief Mills, Deputy Chief Ken Durant, Lieutenant Michael Peraino & Retired Deputy Chief Charles Souther; and Mr. Todd Sherwin) and to inferences reasonably drawn from the evidence as I find credible, I make the findings of fact set forth below.

### The Appellant

1. The Appellant, Kris Phillips, was a tenured employee with 22 years of service with the HPD. He began as a Patrol Officer in September 1987, became Sergeant in 2004, and Lieutenant in 2008. As Lieutenant, he served as shift commander for the Midnight to 8 AM shift, which meant he was the senior HPD officer on duty in charge of the department and all on-duty personnel during his shift. (*Testimony of Appellant*)

2. Prior to the incident in question, Lt. Phillips' record of prior discipline consisted of one reprimand in March 2007 arising from a charge that he had failed to take action to address sick leave abuse by a subordinate officer. (The incident is discussed in further detail below.) (*Exhs. 12 & 13; Testimony of Appellant & Chief Mills*)

### The April 30, 2008 Lincoln Street Incident

3. On the morning of April 30, 2008, a crew from the Hingham Municipal Light Plant (HMLP) was working on Lincoln Street in the vicinity of the "99" Restaurant in Hingham. The crew of seven HMLP employees included Working Foreman Todd Sherwin, an 11-year employee of the HMLP. Lt. Phillips and Lt. Michael Peraino, the latter a 31-year HPD officer, were working a paid detail providing traffic control at the work site, in full-uniform and on-duty. Lt. Phillips and Mr. Sherwin lived approximately a mile apart from each other in Hingham and had a generally "friendly" working

relationship with each other. They have somewhat similar body builds (6 feet, 200+ pounds). (*Exhs 3-ID & 5; Testimony of Appellant, Lt. Peraino & Sherwin*)

4. At some point around 11:00 am, Mr. Sherwin noticed that an unidentified person had arrived on scene and appeared to have a camera pointed at the work site. He gestured or called out to get the attention of Lt. Phillips, who was then about 30 to 40 feet away from Mr. Sherwin, monitoring traffic along Lincoln Street. Lt. Phillips walked over to of the front entrance of the “99” where Mr. Sherwin was standing where they engaged in some conversation. (*Exhs. 3-ID & 5; Testimony of Appellant, Lt. Peraino & Sherwin*)

5. Mr. Sherwin commented that Lt. Phillips must be a “movie star” because the only time anyone had been taking pictures was when he was around, referring, clearly in jest, to an earlier incident in which someone had taken pictures of HMLP workers when Lt. Phillips had also been working a detail. After hearing Mr. Sherwin’s comments, Lt. Phillips turned around, threw his hands out to the side and, according to Mr. Sherwin, “tapped me in the groin.” Lt. Peraino said he saw Lt. Phillips make a “quick gesture with his right hand” that caused Mr. Sherwin to “buckle over”. According to Lt. Peraino, Lt. Phillips returned to the street “laughing and smiling.” (*Exhs. 5 & 6; Testimony of Appellant, Lt. Peraino & Sherwin*)<sup>1</sup>

6. A short while later, according to Mr. Sherwin, Lt. Phillips asked: “Hey, how’s your balls?” Mr. Sherwin grabbed Lt. Phillips by the upper coat area and shoved him away and said; “don’t hit me there again.” Lt. Peraino also saw this second interaction. (*Exhs. 5 & 6; Testimony of Appellant, Lt. Peraino & Sherwin*)

---

<sup>1</sup> Although the parties did not characterize the contact as such, the incident, as the witnesses described it, bears a striking similarity to a teen-age game called “ball tapping”, which refers to a prank that involves an unprovoked, sudden and intentional kicking or hitting a defenseless male in his genitals. See, e.g., [www.urbandictionary.com](http://www.urbandictionary.com) (ball tapping) The evidence does not establish that the person taking pictures of the scene caught any of this incident on film.

7. When asked by Lt. Peraino what happened, Lt. Phillips stated to Lt. Peraino that the two men had been “just fooling around” and “I think I hit Todd in the balls”. At the Commission hearing, Lt. Phillips testified “it was over a year ago” and he didn’t specifically recall if his conversations with Lt. Peraino occurred after the first and/or the second interaction with Mr. Sherwin. (*Exh.6; Testimony of Appellant & Lt. Peraino*)

8. Lt. Peraino did not do anything further to check on Mr. Sherwin. He testified he saw nothing he considered to be a criminal act which, if he had seen one, he would have had the obligation to report it to someone in authority. (*Testimony of Lt. Peraino*)

9. The incident left Mr. Sherwin embarrassed and in pain. He did not, however, initially report the incident either. Mr. Sherwin understood that the HMLP had a “zero tolerance” policy for violence in the workplace and feared his own conduct, albeit in self-defense, could be grounds for himself being disciplined or even terminated. I credit this explanation. (*Exh.16; Testimony of Sherwin*)

10. Several days after the incident, Lt. Phillips took a nasty fall at work and went out on injured on duty (IOD) leave. He was not cleared to return to duty until August 2008. During his leave, he was heavily medicated with pain killers, including several narcotics. (*Exh.18; Testimony of Appellant & Chief Mills*)

#### HPD Investigation of the April 30, 2008 Incident

11. At some time during the first week of May 2008, Deputy Chief Brad Durant learned of the April 30, 2008 Lincoln Street incident through a conversation with HPD Detective McInnis. Deputy Chief Durant commenced an investigation, which included interviews with Lt. Peraino, Mr. Sherwin and Thomas Orlowiski (another HMLP foreman, the latter stating he did not witness any altercation). He also called Lt. Phillips

(then on IOD leave) to inform him he was under investigation for an alleged assault of Mr. Sherwin and invited him to submit a report and answer questions voluntarily. Lt. Phillips stated he would get back to him. In a report to Chief Mills dated May 14, 2008, Deputy Chief Durant recommended termination of Lt. Phillips for criminal conduct unbecoming an officer. (*Exh.5; Testimony of Appellant & Chief Mills*)

12. On July 11, 2008, having not yet had a response from Lt. Phillips, Deputy Chief Durant issued a written request that reiterated his offer for an opportunity for Lt. Phillips to make a voluntary written response to the allegations, which he requested on or before July 18, 2008. (*Exh.11; Testimony of Appellant*)

13. By a one-page "To From" dated July 16, 2008, Lt. Phillips responded to Deputy Chief Durant in which he reports "to the best of my memory regarding the detail on April 30, 2008". I infer that Lt. Phillips had a "clear head" when he wrote this report. He recounted how Mr. Sherwin was "poking fun" about the picture-taking and states:

"I turned around to walk away and at the time I took my hand and as an act of horseplay I snapped my finger tips at Todd's midsection striking him in the groin area. . . .In no way was my action intended to hurt Todd. . . .While my back was turned Todd lightly pushed me away and a few moments later he grabbed me from behind and stated don't hit me there again. I again took Todd's actions as horseplay and thought nothing more of it. Todd did not seem to be mad. Another Light Dept Employee [Jim] stated 'he knows you guy [sic] were only fooling around'. I then spoke to Mike Peraino . . . telling him I think I hit Todd in the balls. Everyone went back to work. I did not know Todd was upset, nothing else was ever said. . . . I certainly regret if my actions caused any offense or embarrassment to any party."

(*Exh.6; Testimony of Appellant*)

14. Chief Mills recommended to the Hingham Board of Selectmen that Lt. Phillips be terminated from employment at the HPD. This recommendation was held in abeyance pending Lt. Phillips' clearance to return to duty from IOD leave, which he received in

August 2008, at which time Chief Mills put Lt. Phillips on paid administrative leave, pending a disciplinary hearing. (*Testimony of Chief Mills*)

15. On December 9, 2008, the Hingham Board of Selectmen issued a notice of disciplinary hearing to Lt. Phillips. Following the disciplinary hearing on January 13, 2009, the Board of Selectmen, on the recommendation of Chief Mills, voted unanimously to terminate Lt. Phillips. By letter of that date, Chief Mills informed Lt. Phillips that his employment was terminated, effective immediately. (*Exhs. 1, 2 & 2A-ID*)

16. Chief Mills testified before the Commission that it was his opinion that Lt. Phillips' actions on April 30, 2008, when taken together with his subsequent lack of contrition and veracity concerning that behavior, required his termination from the HPD, because they were unbecoming an HPD officer, especially a superior officer, who should be held to a higher standard of conduct that is "beyond reproach, especially [when] on-duty". He stated that, while, sometimes progressive discipline in the form of suspensions, transfers or demotions are appropriate, here, he believed that any discipline short of termination would be "unconscionable" and "outside of my obligation" to provide a police force free of any suggestions of impropriety. (*Testimony of Chief Mills*)

#### The Criminal Cases

17. Although neither Mr. Sherwin nor Lt. Peraino lodged a complaint against Lt. Phillips, a Criminal Complaint issued on or about October 16, 2008, charging Lt. Phillips with violating G.L.c.265,§13D, for assault and battery upon a public employee. According to court records, this investigation was initiated in August 2008 by the Massachusetts State Police at the request of Chief Mills. On May 20, 2009, the District Court (Merrick, J.) dismissed the case "in the interest of public justice" and it appearing

that “the victim desires this result.” The Commonwealth appealed to the Massachusetts Appeals Court, which reversed the District Court’s order in December 2010 on grounds that the District Court exceeded its authority to dismiss a case over the Commonwealth’s objections. (*Exhs.14, 14A, 15 & 15A; Testimony of Chief Mills; Administrative Notice, Commonwealth v. Phillips, 78 Mass.App.Ct. 1116 (2010) (Docket No. 2009-P-2201)*)

18. Meanwhile, on December 18, 2008, Lt. Phillips applied for a Criminal Complaint against Mr. Sherwin, alleging that he (Phillips) had been criminally assaulted in violation of the same statute under which he had been charged (i.e., assaulting a public employee). Lt. Phillips testified that he sought the complaint because he had recently seen reports that stated Mr. Sherwin was upset and wanted to “get even with me.” Lt. Phillips’ application was denied without hearing by a clerk-magistrate “based on complainant’s attached statement & referenced report as well as evidence taken at related hearing where complainant was [defendant].” (*Exh.7; Testimony of Appellant*)

19. In support of his request for a Criminal Complaint, Lt. Phillips stated:

“On April 30, 2008 while working with Todd Sherwin he did attack me by pushing grabbing and putting his hand around my throat causing me pain and discomfort.”

“[M]yself and Todd Sherwin were involved in what I felt was an incident of horseplay. On November 29, 2008 I received a report from Mass. State Police Lt. Paul D’Amore detailing an interview with Todd Sherwin that had been conducted on September 3, 2008. This report stated I (Kris Phillips) struck Todd Sherwin in the groin area. And I (Kris Phillips) then walked away . . . This report also states that after minutes I (Kris Phillips) was about 15 feet away . . . [when] Mr. Sherwin approached Kris Phillips grabbed Kris Phillips by the left shoulder and neck and pushed Kris Phillips. . . . After these minutes had gone by I feel that this was no longer an act of horseplay but a premeditated and planned attack. I did feel some amount of pain in my neck and throat. It should be noted that I was in full uniform and on duty with the Hingham Police Department. Respectfully, I request a charge of Assault and Battery on a Police Officer charge be issued on Mr. Todd Sherwin.

(*Exh. 7) (emphasis added)*

### Evidence of Bias Against the Appellant

20. The Appellant asserted that Chief Mills harbored a personal animus against him, stemming back to 2006 when (then Sergeant) Phillips was assigned to investigate an incident involving another officer (J.D.). Sgt. Phillips happened to come to learn from a source at Hingham High School that J.D. allegedly hosted an underage drinking party at his home. He went to his superior officer, (then Captain and de facto Deputy Chief) Mills with this information. It is undisputed that J.D. and Chief Mills' son were then roommates who also worked together in the Hingham Harbormaster's Department. *(Testimony of Appellant & Chief Mills)*

21. According to the Appellant, Capt. Mills shut his office door and said to put the information "in your back pocket and hold it over [J.D.] for the rest of his career." Sgt. Phillips then reported what he had learned to (now deceased) Chief Steven Carlson, with Capt. Mills present, but did not mention Mills' comment to "put this information in your back pocket". Chief Carlson ordered Sgt. Phillips to follow-up on the investigation and file a written report, which he did. On April 23, 2006, Chief Carlson issued a disciplinary notice to Officer J.D., stating that, based on the admission of conduct unbecoming an officer, he was ordered to take ten days punishment duty without compensation. *(Exhs. 10A & 10B; Testimony of Appellant & Chief Mills)*

22. Chief Mills acknowledged he and Sgt. Phillips had a conversation about the J.D. investigation. He emphatically denied making any statement remotely close to the "in your back pocket" remark and, claims that he, not Chief Carlson, ordered him to pursue the investigation and write the report. He pointed to Sgt. Phillips' written report which is



directed “To: Captain Mills” and begins “per your order, I am looking into a situation involving Officer [J.D.] . . . .” (*Exh. 10A; Testimony of Appellant & Chief Mills*)

23. The Appellant credibly testified that the J.D. incident memorandum was addressed to Capt. Mills essentially as a matter of protocol, and that Chief Carlson was the person who directed Sgt. Phillips to look into the matter further. I also tend to believe that Sgt. Phillips honestly remembers that he heard Capt. Mills say something about keeping “it in your back pocket” which Chief Mills no longer recalls. I infer, however, that the statement is taken out of context that neither party fully explained and I do not infer that Chief Mills was suggesting that Sgt. Phillips overlook the matter. After all, this incident involved the same J.D. for whom Sgt. Phillips was later reprimanded for, himself, covering up J.D.’s sick leave abuse soon thereafter (i.e., two months later, in June 2006), as described below in Findings of Fact ¶¶25-26. (*Exhs. 10A, 10B & 13; Testimony of Appellant & Chief Mills*)

24. The Appellant testified that, following this incident, his relationship with Capt. Mills took a turn for the worse. He says Capt. Mills became “unfriendly”, “nit-picked” him for any mishaps, and made him the target of investigations for the first time in his career. (*Testimony of Appellant*)

25. One of these allegedly retaliatory actions resulted in a Letter of Reprimand, the first he had ever received, on March 23, 2007, stemming from his failure, as a supervisor, to timely report and hold accountable Officer J.D. for the abuse of sick time in June 2006. This Letter of Reprimand was issued by Chief Carlson, as a result of an investigation report from Lt. James Taylor addressed to both Chief Carlson and Capt. Mills. (*Exhs. 12 & 13; Testimony of Appellant & Chief Mills*)

26. The March 2007 reprimand of Sgt. Phillips, interestingly, suggests that Lincoln Street incident was not the first time Lt. Phillips was accused of fudging the truth. Chief Carlson found, among other things: "It is troubling to observe that upon being ordered to write a report on a serious matter you neglected a significant detail. Subsequently in March 2007 you 'discovered' the sick day issue . . . I suggest a reasonable and prudent person, knowing the relationship you share with Officer [J.D.] . . . would find it seemingly unlikely the specific information detailed in the February report to Deputy Mills was in fact 'forgotten' until November 2006 and '. . . as a direct result . . .' of a workplace harassment complaint filed in November 2006 it is remembered." (*Exh. 13*)

27. At least two other matters were investigated, but no wrongdoing found. One matter cleared Sgt. Phillips of a report that he pressured a local businessman to hire his (Phillips') son to perform home repairs and another inquiry was made, after his son was caught with possession of drugs in school, to assure that Sgt. Phillips he had not improperly interfered on his son's behalf. (*Exhs. 12 & 13; Testimony of Appellant & Chief Mills*)

28. In the fall of 2007, Sgt. Phillips was interviewed by the Hingham Board of Selectmen as a candidate for promotion to Lieutenant. At the interview, he responded to questions about manpower shortages in the department and how he would resolve them. (*Testimony of Appellant*)

29. The Appellant testified that, following the interview, Capt. Mills confronted him in the parking lot and said that Sgt. Phillips had made him "look bad", that he "wouldn't forget it", and that Sgt. Phillips was not getting his recommendation for promotion. Chief Mills did not deny making these statements during his rebuttal testimony. The Appellant

agreed, however, that the promotion went to another candidate with “a good deal more seniority and experience.” (*Testimony of Appellant & Chief Mills*)

30. Due to Chief Carlson’s untimely death shortly thereafter, another opportunity for promotion to Lieutenant arose. Sgt. Phillips was the only candidate left on the eligible list and he received the promotion without having to go through any new interview or assessment process. (*Testimony of Appellant & Chief Mills*)

31. In anticipation of this promotion, Chief Mills called Sgt. Phillips to his office and, according to Chief Mills, offered “constructive criticism” to him, as he would be assuming an important leadership role on the HPD management team. The Appellant testified that Chief Mills told him he was going to have to “take some shit” and spent 30 minutes “berating him.” Deputy Chief Charles Souther, now retired, was also present. Dep. Chief Souther had little “recall of actual statements”. He testified that the meeting was a “coaching session” for the benefit of Sgt. Phillips. After the meeting ended, Deputy Chief Souther shook Sgt. Phillips’ hand and said he deserved the promotion. (*Testimony of Appellant, Chief Mills & Dep. Chief [ret.] Souther*)

32. According to the Appellant, during this meeting, Chief Mills brought up an earlier incident in which, while the Officer in Charge (OIC) in September 2007, Sgt. Phillips had left the police station to assist with a “water rescue” without informing anyone of his whereabouts. The Appellant testified that Chief Mills told him that, if he did that again while he was the OIC, he would “have my stripes”. Despite Chief Mills’ denial that he made that statement, I find it is entirely consistent with his persona as a commander who speaks his mind freely, which I perceived in his demeanor and testimony before the Commission. I find it credible that, at some point, Chief Mills probably did say

something of that nature, if not specifically at the meeting Appellant recalls, then, during another conversation. (*Testimony of Appellant, Chief Mills & Dep. Chief Durant*)

33. The Appellant said he had duly notified Lt. Durant, who “for all practical purposes” was his superior officer and who relieved him of duty. Lt. (now Deputy Chief) Durant had no specific memory of doing so. I have not heard sufficient evidence to make definitive findings as to this collateral issue, save to conclude that, since no formal reprimand was issued, at the most, the matter was considered a minor lapse of protocol on Sgt. Phillips’ part, as to which no record was made and no formal disciplinary action taken. (*Testimony of Appellant, Chief Mills & Dep. Chief Durant*).

#### Evidence of Disparate Treatment of the Appellant

34. The Appellant presented evidence of other discipline imposed by the HPD for conduct unbecoming an officer and other serious misconduct which allegedly showed that his termination was out-of-line with appropriate discipline imposed in similarly situated cases. (*Exhs. 4, 8, 9 & 17; Testimony of Appellant, Chief Mills & Lt. Peraino*)<sup>2</sup>

35. In November 1990, the Hingham Board of Selectmen imposed a discipline of nine (9) days punishment duty upon Patrolman R.S., after finding that “in the Hingham Police Department parking lot and while on duty, you physically attacked fellow officer [J.N.] by grabbing him by the throat as he sat in his police cruiser. The conduct described constitutes conduct unbecoming a police officer.” (*Exh. 4*)

36. The April 2006 discipline (10 days of punishment duty) of Officer J.D. by Chief Carslon for participation in a party at his home at which underage drinking was allowed has been previously described in Findings of Fact ¶¶ 20 through 23. (*Exhs. 10A & 10B*)

---

<sup>2</sup> The evidence of disparate treatment was taken *de bene*, subject to Hingham’s motion to strike filed at the close of the evidence, which was taken under advisement and, given the disposition of the matter on the merits, will be denied as moot.

37. On January 16, 2007, Chief Carlson issued a written reprimand (along with forfeiture of 40 hours compensatory time) to Officer J.N. after finding he mishandled evidence in a case that “irreparably damaged the prospects of successful prosecution” and “may have seriously compromised this agency’s reputation.” (*Exhs. 8 & 17*)

38. On March 28, 2008, Chief Mills and Sergeant R.C.C. entered into an agreement by which the officer received a three (3) day suspension and referral to an Employee Assistance Program for remedial supervisor training, after having been found guilty of “gross incompetence” in the failure to properly report evidence of a case of child abuse as required by law and in “negligent supervision” of his subordinates on the case, with the proviso that further such negligent supervision will result in his immediate demotion in rank to Patrol Officer. (*Exh. 9; Testimony of Chief Mills*)

39. Evidence was proffered, but not accepted, concerning an additional incident in which Patrolman R.S., while servicing as the school services officer, allegedly struck a female school administrator, which caused R.S. to be involuntarily reassigned. No documents evidencing this incident were introduced and no percipient witness was produced who recalled the circumstances, although it is clear that, whatever happened, it would have occurred ten years or more in the past. I give no credit to any proffer on this subject. (*Testimony of Chief Mills, Lt. Peraino & Dep. Chief [ret.] Souther*)

## **CONCLUSION**

Under G.L.c.31, §43, a tenured civil service employee aggrieved by a disciplinary decision of an appointing authority made pursuant to G.L.c.31, §41, may appeal to the Commission. The Commission must determine, under a “preponderance of the evidence” test, whether the appointing authority met its burden of proof that “there was just cause”

for the action taken. G.L.c.31, §43. See, e.g., Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823, (2006); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Serv. Comm'n, 38 Mass App.Ct.473,477 (1995); Watertown v. Arria, 16 Mass.App Ct. 331,334, rev.den.,390 Mass. 1102 (1983).

The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Serv. Comm'n, 43 Mass. App. Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983). The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system 'to guard against political considerations, favoritism and bias in governmental employment decisions.'" Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. See also Heady v. Town of Great Barrington, 20 MCSR 2209, 214 (2007) and cases cited ("The law supports uniformity of punishment for similar offenses committed within both a departmental unit and a particular position.") It is also a basic tenet of the "merit principle" of Civil Service Law that discipline must be remedial, not punitive, designed to "correct inadequate performance" and "separating employees whose inadequate performance cannot be corrected." G.L.c.31,§1.

An action is "justified" if "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and

by correct rules of law." Commissioners of Civil Serv. v. Municipal Ct., 359 Mass. 211, 214 (1971); Cambridge v. Civil Serv. Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). An appointing authority's burden of proof is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) The Commission must take account of all credible evidence in the record, including whatever may fairly detract from the weight of any particular evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65 (2001)

It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. "[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance." E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003) (where live witnesses gave conflicting testimony, decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing)

In performing its appellate function, "the commission does not view a snapshot of what was before the appointing authority . . . the commission hears evidence and finds facts anew. . . . [after] 'a hearing de novo upon all material evidence and . . . not merely

for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer' . . . For the commission, the question is . . . 'whether, *on the facts found by the commission*, there was reasonable justification for the action taken by the appointing authority *in the circumstances found by the commission to have existed* when the appointing authority made its decision.' " Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003) See also Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823; Cambridge v. Civil Serv. Comm'n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997); Watertown v. Arria, 16 Mass. App. Ct. 331, 334, rev.den., 390 Mass. 1102, (1983). See generally Villare v. North Reading, 8 MCSR 44, reconsidered, 8 MCSR 53 (1995) (discussing de novo fact finding by "disinterested" Commissioner in context of procedural due process)

G.L.c.31, Section 43 also vests the Commission with the authority to affirm, vacate or modify the penalty imposed by the appointing authority. The Commission has been delegated with "considerable discretion", albeit "not without bounds", to modify a penalty imposed by the appointing authority, so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. E.g., Police Comm'r v. Civil Serv. Comm'n, 39 Mass.App.Ct. 594,600 (1996) and cases cited.

"It is well to remember that the *power to modify is at its core the authority to review* and, when appropriate, *to temper, balance, and amend*. The power to modify penalties permits the furtherance of uniformity and equitable treatment of similarly situated individuals. *It must be used to further, and not to frustrate, the purpose of civil service legislation, i.e., 'to protect efficient public employees from partisan political control' . . . and 'the removal of those who have proved to be incompetent or unworthy to continue in the public service'.*"

Id., 39 Mass.App.Ct. at 600. (*emphasis added*). See Faria v. Third Bristol Div., 14 Mass.App.Ct. 985, 987 (1982) (remanded for findings to support modification)



In deciding whether to exercise discretion to modify a penalty, the Commission's task "is not to be accomplished on a wholly blank slate". Unless the Commission's findings of fact differ materially and significantly from those of the appointing authority or interpret the relevant law in a substantially different way, the Commission is not free to "substitute its judgment" for that of the appointing authority, and "cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation." E.g., Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823 (2006) and cases cited (minor, immaterial differences in factual findings by Commission and appointing authority did not justify a modification of 180 day-suspension to 60 days); Town of Falmouth v. Civil Service Comm'n, 61 Mass.App.Ct. 796 (2004) (modification of 10-day suspension to 5 days unsupported by material difference in facts or finding of political influence); Commissioner of MDC v. Civil Service Comm'n, 13 Mass.App.Ct. 20 (1982) (discharge improperly modified to 20-month suspension).

Applying these principles to the facts of this appeal, Hingham has justified its decision to terminate Lt. Phillips employment by the preponderance of the credible evidence. The facts support a finding that Lt. Phillips and Mr. Sherwin initially were engaged in mutually consensual "horseplay" with each other during their encounter on April 30, 2008. I find the evidence inconclusive that Lt. Phillips intentionally meant to "ball tap" Mr. Sherwin or cause him any physical harm, but his immature behavior clearly led to that result.<sup>3</sup> Had that been the only questionable conduct involved, a

---

<sup>3</sup> The issue of whether or not Lt. Phillips (or Mr. Sherwin) committed a violation of G.L.c.265, §13D is not before the Commission and this Decision does not reach that question. The Commission need only be satisfied that, on a preponderance of the evidence, Lt. Phillips was culpable of unacceptable behavior unbecoming an officer, while the standard under the criminal statute requires proof beyond a reasonable doubt of "intentional" assault and battery and/or a "reckless and wanton act (something more than gross negligence) causing physical or bodily injury" to a public employee. See Commonwealth v. Correia, 50 Mass.App.Ct. 455, 465-57, rev.den., 434 Mass. 1102 (2000)

remedial penalty short of termination plausibly might have been given more serious consideration. However, the cavalier manner in which Lt. Phillips continued to handle the situation at the scene, after he hit Mr. Sherwin in the groin, coupled with his mendacious behavior thereafter, fully warrants the conclusion that Hingham was justified to find him unsuitable to be employed in the position of an HPD police officer.

First, the substantial credible evidence showed that Lt. Phillips knew, or should have known, immediately after his hand made contact with Mr. Sherwin's groin area, that he had done so and likely caused Mr. Sherwin embarrassment and pain. His own testimony tends to acknowledge that fact and the testimony of Lt. Peraino, whose percipient observations and impartial status gives him considerable credibility, established that Lt. Phillips' blow was severe enough to cause Mr. Sherwin to "buckle over". I cannot find it credible that Lt. Phillips, a 22-year veteran police officer, was so oblivious that he would not have taken note of such a reaction. Indeed, were it true that he was so oblivious to care whether he had hurt Mr. Sherwin, that behavior, also, would be problematic for an on-duty, uniformed superior officer. Rather, Lt. Phillips showed no remorse or immediate concern for Mr. Sherwin. He continued to make light of the encounter well after it occurred and first came to acknowledge any degree of responsibility or remorse in one equivocal sentence in his July 16, 2008 report, in which he states, without mentioning Mr. Sherwin by name: "I certainly regret if my actions caused any offense or embarrassment to any party."

Second, Lt. Phillips showed no qualms in changing his story when faced with the prospect of criminal charges against him. What had, up to that point, been a joking matter, turned into a nasty counter-volley of criminal accusations directed at Mr.

Sherwin. The evidence established that the driving force behind prosecuting the criminal case against Lt. Phillips was the Massachusetts State Police – presumably acting at the behest of Chief Mills – not Mr. Sherwin. Yet, Lt. Phillips chose to “fudge the truth” in an attempt to cloud the issues and discredit Mr. Sherwin. For a ranking superior police officer to accuse a civilian with criminal misconduct, employing an artifice that he knows was not true, in an effort to deflect responsibility for his own actions, is clearly a factor that Hingham properly took into account in finding Lt. Phillips unsuitable to hold a position as a law enforcement officer. See City of Cambridge v. Civil Service Comm’n, 43 Mass. 300, 303 (1997) (“The city was hardly espousing a position devoid of reason when it held that a demonstrated willingness to fudge the truth in exigent circumstances was a doubtful characteristic for a police officer. . . . It requires no strength of character to speak the truth when it does not hurt.”) See, e.g., Desharnais v. City of Westfield, 23 MCSR 418 (2010) (officer damaged his cruiser while engaged in “cowboyish” spins and then untruthfully denied his antics); Mozeleski v. Chicopee, 21 MCSR 676 (2008) (lying to cover-up inappropriate conduct during a late-night traffic stop); Rizzo v. Town of Lexington, 21 MCSR 634 (2008) (police officer failed to report use of force and later misrepresented level of force used); Layne v. Town of Tewksbury, 20 MCSR 372 (2007)( police officer denied using profanity directed to accident victims)

The allegation that Chief Mills harbored a personal animus against Lt. Phillips is not without some evidentiary support. I tend to believe Lt. Phillips’ recollection of the conversations he had with Chief Mills (one involving Officer J.D., the second after his first interview for Lieutenant and the third upon his promotion to Lieutenant), but I discount most of the evidence as insufficient to establish bias, as opposed to “tough love”

meted out by a commander who holds his staff to a high standard of performance. Chief Mills clearly held good-faith doubt, both before and after the promotion, for Phillips' ability to step-up to the command responsibility demanded of a Lieutenant, recommending his bypass initially. Yet, Chief Mills gave Phillips the benefit of that doubt when the next opportunity for promotion arose, although, given the "short list", he also might have elected to bypass him again, call for a new list, and recommend another candidate for provisional appointment even at that time as well. See G.L.c.31, §27, ¶1.

It does give me pause that Chief Mills took steps to instigate an "independent" criminal investigation against Lt. Phillips by the Massachusetts State Police, when neither percipient witness (Mr. Sherwin and Lt. Peraino) had found reason to report any alleged crime (although both Deputy Chief Durant and Massachusetts State Police Lt. D'Amore ultimately did), and that the Commonwealth, for unexplained reasons, remained highly motivated to take the case forward (all the way to the Appeals Court), when the "victim" was not interested in pursuing the matter. I do not fully comprehend why Chief Mills sought out this criminal investigation when he did, while Lt. Phillips' civil service disciplinary proceedings remained in limbo and before he was afforded a hearing before the Board of Selectmen.. It would certainly have been useful not to have blurred the lines between the criminal and civil cases in this fashion. Nevertheless, Chief Mills' decision to involve the State Police does not excuse Lt. Phillips own wholly contrived and retaliatory response to that prosecution which he irresponsibly directed at Mr. Sherwin.

Finally, I find that the evidence does not support a claim of disparate treatment or otherwise can justify the Commission's exercise of discretion to modify the penalty imposed by Hingham in this case.

None of the cases of other discipline of HPD officers involved a physical injury to a civilian by an on-duty, uniformed HPD superior officer, who showed little or no remorse for his actions or for subsequently fudging the truth concerning the incident. The incident with Patrolman R.S. occurred nearly twenty years earlier, involved a confrontation between two police officers at HPD headquarters, came before an entirely different Board of Selectmen and was not a matter in which Chief Mills was personally involved. The April 2006 incident with Officer J.D. occurred off-duty on private property and Officer J.D. admitted his actions were unbecoming an officer.

The three prior disciplines of superior officers all concerned remedial actions taken for serious lapses of judgment in command responsibility. None involved a physical confrontation. Sgt. R.C.C. admitted to his failure to properly supervise a case of child abuse for which Chief Mills imposed an agreed discipline. Lt. J.N. was reprimanded by former Chief Carlson for mishandling evidence. The third case involved a March 2007 reprimand of Sgt. Phillips, himself, by Chief Carlson (on Capt. Mills' recommendation) for "forgetting" to report a subordinate's sick leave abuse.<sup>4</sup>

I also have considered carefully whether the circumstances justify the Commission's exercise of discretion to modify the penalty imposed. Reasonable minds could conclude that a lengthy suspension and/or demotion to patrol officer should have been considered sufficiently remedial discipline that would still set the standard for the other officers in the HPD, the latter point being one of Chief Mills' main concerns. Chief Mills' actions in seeking to instigate a criminal investigation of an incident that, apparently, no one else

---

<sup>4</sup> The Appellant is hard pressed to argue that he was too harshly disciplined for the Lincoln Street incident because he received leniency from Capt. Mills and Chief Carlson in a previous incident of poor performance and shading the truth. Indeed, it is also hard to reconcile Capt. Mills' leniency on that prior occasion with the Appellant's contention of bias allegedly dating back to 2006.

wanted, do suggest a possible pre-disposition and rush to judgment on the civil side. However, the Commission does not consider that possibility in a vacuum, but must take into account the totality of the circumstances, which, here, reveals an absence of sufficient and credible evidence of disparate treatment and/or personal animus, as well as Hingham's well-founded proof of Lt. Phillips unconscionable behavior both at the scene and after the incident had occurred, which, reasonably justifies his termination. The Appellant is obliged to hew to rational standards of conduct prescribed by his commanding officer and must accept responsibility for the consequences of his actions in this matter as determined by his appointing authority. Despite Lt. Phillips' long career of meritorious service, when the material facts as found by the Commission do not differ significantly from those reasonably relied upon by the Hingham Board of Selectmen, which is the case here, the Commission cannot substitute its judgment for that of the appointing authority, and will not order Lt. Phillips be reinstated to duty as a Hingham police officer.

Accordingly, for the reasons stated above, the appeal of the Appellant, Kris Philips, must be and hereby is *dismissed*.

Civil Service Commission

Paul M. Stein  
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell & Stein, Commissioners) on March 24, 2011.

A True Record. Attest:

---

Commissioner

Sherwin. The evidence established that the driving force behind prosecuting the criminal case against Lt. Phillips was the Massachusetts State Police – presumably acting at the behest of Chief Mills – not Mr. Sherwin. Yet, Lt. Phillips chose to “fudge the truth” in an attempt to cloud the issues and discredit Mr. Sherwin. For a ranking superior police officer to accuse a civilian with criminal misconduct, employing an artifice that he knows was not true, in an effort to deflect responsibility for his own actions, is clearly a factor that Hingham properly took into account in finding Lt. Phillips unsuitable to hold a position as a law enforcement officer. See City of Cambridge v. Civil Service Comm’n, 43 Mass. 300, 303 (1997) (“The city was hardly espousing a position devoid of reason when it held that a demonstrated willingness to fudge the truth in exigent circumstances was a doubtful characteristic for a police officer. . . . It requires no strength of character to speak the truth when it does not hurt.”) See, e.g., Desharnais v. City of Westfield, 23 MCSR 418 (2010) (officer damaged his cruiser while engaged in “cowboyish” spins and then untruthfully denied his antics); Mozeleski v. Chicopee, 21 MCSR 676 (2008) (lying to cover-up inappropriate conduct during a late-night traffic stop); Rizzo v. Town of Lexington, 21 MCSR 634 (2008) (police officer failed to report use of force and later misrepresented level of force used); Layne v. Town of Tewksbury, 20 MCSR 372 (2007)( police officer denied using profanity directed to accident victims)

The allegation that Chief Mills harbored a personal animus against Lt. Phillips is not without some evidentiary support. I tend to believe Lt. Phillips’ recollection of the conversations he had with Chief Mills (one involving Officer J.D., the second after his first interview for Lieutenant and the third upon his promotion to Lieutenant), but I discount most of the evidence as inconclusive of bias, as opposed to “tough love” meted

out by a commander who holds his staff to a high standard of performance. Chief Mills clearly held good-faith doubt, both before and after the promotion, for Sgt. Phillips' ability to step-up to the command responsibility demanded of a Lieutenant, recommending his bypass initially. Yet, Chief Mills gave Sgt. Phillips the benefit of that doubt when the next opportunity for promotion arose, although, given the "short list", he also might have elected to bypass him again, call for a new list, and recommend another candidate for provisional appointment even at that time as well. See G.L.c.31, §27, ¶1.

It also does give me pause that Chief Mills took steps to instigate an "independent" criminal investigation against Lt. Phillips by the Massachusetts State Police, when neither percipient witness (Mr. Sherwin and Lt. Peraino) had found reason to report any alleged crime (although both Deputy Chief Durant and Massachusetts State Police Lt. D'Amore ultimately did), and that the Commonwealth, for unexplained reasons, remained highly motivated to take the case forward (all the way to the Appeals Court), when the "victim" was not interested in pursuing the matter. I do not fully comprehend why Chief Mills sought out this criminal investigation when he did, while Lt. Phillips' civil service disciplinary proceedings remained in limbo and before he was afforded a hearing before the Board of Selectmen.. It would certainly have been useful not to have blurred the lines between the criminal and civil cases in this fashion. Nevertheless, Chief Mills' decision to involve the State Police does not excuse Lt. Phillips own wholly contrived and retaliatory response to that prosecution which he irresponsibly directed at Mr. Sherwin.

Finally, I find that the evidence does not support a claim of disparate treatment or otherwise can justify the Commission's exercise of discretion to modify the penalty imposed by Hingham in this case.



None of the cases of other discipline of HPD officers involved a physical injury to a civilian in public by an on-duty, uniformed HPD superior officer, who showed little or no remorse for his actions or for subsequently fudging the truth concerning the incident. The incident with Patrolman R.S. occurred nearly twenty years earlier, involved a confrontation between two police officers at HPD headquarters, came before an entirely different Board of Selectmen and was not a matter in which Chief Mills was personally involved. The April 2006 incident with Officer J.D. occurred off-duty on private property and Officer J.D. admitted his actions were unbecoming an officer.

The three prior disciplines of superior officers all concerned remedial actions taken for serious lapses of judgment in command responsibility. None involved a physical confrontation. Sgt. R.C.C. admitted to his failure to properly supervise a case of child abuse for which Chief Mills imposed an agreed discipline. Lt. J.N. was reprimanded by former Chief Carlson for mishandling evidence. The third case involved a March 2007 reprimand of Sgt. Phillips, himself, by Chief Carlson (on Capt. Mills' recommendation) for "forgetting" to report a subordinate's sick leave abuse.<sup>4</sup>

I also have considered carefully whether the circumstances justify the Commission's exercise of discretion to modify the penalty imposed. Reasonable minds could conclude that a lengthy suspension and/or demotion to patrol officer should have been considered sufficiently remedial discipline that would still set the standard for the other officers in the HPD, the latter point being one of Chief Mills' main concerns. Chief Mills' actions in seeking to instigate a criminal investigation of an incident that, apparently, no one else

---

<sup>4</sup> The Appellant is hard pressed to argue that he was too harshly disciplined for the Lincoln Street incident because he received leniency from Capt. Mills and Chief Carlson in a previous incident of poor performance and shading the truth. Indeed, it is also hard to reconcile Capt. Mills' leniency on that prior occasion with the Appellant's contention of bias allegedly dating back to 2006.

wanted, do suggest a possible pre-disposition and rush to judgment on the civil side. However, the Commission does not consider that possibility in a vacuum, but must take into account the totality of the circumstances, which, here, reveals an absence of sufficient and credible evidence of disparate treatment and/or personal animus, as well as Hingham's well-founded proof of Lt. Phillips unconscionable behavior both at the scene and long afterward, which, reasonably justifies his termination. The Appellant is obliged to hew to rational standards of conduct prescribed by his commanding officer and must accept responsibility for the consequences of his actions in this matter as determined by his appointing authority. Despite Lt. Phillips' long career of meritorious service, under the controlling civil service law, when the misconduct found by the Commission does not vary materially from that reasonably relied upon by the Hingham Board of Selectmen, which is the case here, the Commission is precluded from substituting its judgment on the level of discipline for that misconduct chosen by the appointing authority, and cannot order Lt. Phillips be reinstated to duty as a Hingham police officer.

Accordingly, for the reasons stated above, the appeal of the Appellant, Kris Philips, must be and hereby is *dismissed*.

Civil Service Commission  
  
Paul M. Stein  
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell & Stein, Commissioners) on March 24, 2011.

A True Record. Attest:

  
Commissioner

**Commissioner Marquis was  
absent on March 24, 2011**

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(I), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:

Alan J. McDonald, Esq. (for Appellant)

James A. Toomey, Esq. (for Appointing Authority)